Ethics, Legal Sufficiency, and the Role of Counsel

Danielle P. Bianchi
Counsel for the Inspector General of the Marine Corps
Office of the Counsel for the Commandant

Overview

- Counsel/SJA support
  - CL supports IGMC
  - Either SJA or CL support Command IG (CIG)
    - Subject matter
    - Conflicts
    - IGMC oversight
- Early legal engagement with CIG
    - Frame allegations
    - Discuss investigative plan
- Attorneys provide Legal Sufficiency Reviews for all CIG Reports of Investigation (ROI)
    - Concurrence legal review on all Preliminary Inquiries (PI)
- Legal Sufficiency determination is critical

Inquiries v. Investigations

- IG Preliminary Inquiry: An informal fact-finding process conducted to gather sufficient information to determine investigative merit. Once investigative merit is established, it becomes necessary to notify the Subject (or his command) of the allegations, or extensive witness interviews are required, the inquiry is over and an investigation will begin.
- IG Investigation: An examination into specific allegations of wrongdoing that involves the systematic collection and examination of testimony and documents to determine the facts and draw conclusions. The results are reported in an ROI.

Command v. IG Product

Command

- **NOT an alternative to an IG product**
- Will not solely resolve IG inquiries or investigations, appropriately used as evidence or findings of fact
- JAGMAN Preliminary Inquiry
  - Subject interview without notification
  - Extremely problematic for IG process: due process concerns

IG

- **IG MUST turn command product into an IG product before Legal Sufficiency Review**
- Starts with IG ✉ Ends with IG
- CIG CANNOT do a JAGMAN
  - IG ALWAYS wears the "IG hat" and IG investigatory requirements follow
- IG Preliminary Inquiry
  - Never interview subject in PI
  - Not an avoidance tactic (for Legal Sufficiency Review or the ODN—revised LEGADMINMAN)

Legal Sufficiency Analysis CHECKLIST (YAY from the crowd!)

- ✓ Properly framed allegations using language of the standard
- ✓ Logical & complete findings of fact, proper analysis applying standard to facts, and conclusion supported by facts and analysis
- ✓ To be substantiated, an allegation must be legally sufficient by a preponderance of the evidence
- ✓ Legal Sufficiency Review cannot “amend” the ROI and should not contain disposition advice
- ✓ Long Legal Sufficiency Review is a red flag that there are problems with ROI
- ✓ If not legally sufficient, goes back to IG for improvements

Disagreements

- CG does not have the option change a substantiation but CG always has discretion regarding what, if any, disciplinary action to take
  - If CG wants his disagreement to be a “non-concur” (i.e., change to not substantiated), he must consult with lawyer and CIG and send his non-concur up the chain for a determination
- If SJA/Counsel cannot give an ROI a legal sufficiency review, or concur with a PI, work with IG to correct the product
  - If product cannot be improved, contact Counsel, IGMC

Report Writing: Looks Matter

- Quality product = quality investigation
  - Re-read—No typos or passive voice
  - Don’t list facts without analysis
  - Each allegation has its own analysis
- Avoid judgmental tone in ROI
- Don’t surprise the reader
- HQMC Supplement to the DON Correspondence Manual (MCO 5216.20)
  - “Short sentences are preferable to long ones, but either can become monotonous with continuous use. Mixing them for a change of pace will produce…balanced paragraphs that can stand the test of being read aloud.”

Records Release

- Release of IG records
  - IG Act and confidentiality (reasonable expectation, not a guarantee)
  - PA and FOIA: redactions
  - Official request–relevance?
  - Articulate official purpose in release document
  - Adverse actions
- Speier Amendment
  - O-6 and above should only be O-7(sel) and above (FOIA practice currently redacts PA information unless a public official—defined as O-7(sel) and above)
  - Posting within 60 days of "issuing a final report" should be delayed until after final disciplinary action is complete (FOIA practice currently withholds until this point)

1034 and 1709

- FY2014 NDAA, Section 1709: Prohibition of Retaliation against Members of the Armed Forces for Reporting a Criminal Offense
  - Ostracism and maltreatment
  - SECNAVINST 5370.7 re-write (D version)
- 10 USC 1034: The Military Whistleblower Protection Act, as amended through FY2014 NDAA
  - New SECNAV oversight requirements
    - Prohibited personal action?
      - Correct record
      - “Appropriate” disciplinary action

Key Ethics References

- Office of Government Ethics, 5 C.F.R. §2635 - Standards of Ethical Conduct for Employees of the Executive Branch
- DoD 5500.07-R, Joint Ethics Regulation (JER)
- 5 C.F.R. §3601 - Supplemental Standards of Ethical Conduct for Employees of the Department of Defense
- Title 18, United States Code

General Principles of Public Service

1) Public Service is a Public Trust

2) No financial interests that conflict with the conscientious performance of duty

3) No financial transactions using nonpublic Government information

4) No gift solicitation or acceptance from any person or entity seeking official action

5) Honest effort in the performance of duties

6) No unauthorized commitments/promises of any kind purporting to bind the Government

7) No use of public office for private gain

General Principles of Public Service (cont.)

8) Act impartially: no preferential treatment to any private organization or individual

9) Protect and preserve Federal property, using for only authorized activities

10) No outside employment that conflicts with official Government duties and responsibilities

11) Disclose fraud, waste, abuse, and corruption

12) Satisfy obligations as citizen (i.e., taxes)

13) Provide equal opportunities for all Americans

14) Avoid any actions creating the appearance of an ethical violation (reasonable person standard)

Use of Government Resources

- Personal use of Government property--minimal
- Areas subject to abuse:
  - General office materials
  - General office equipment
  - Subordinate employee time
  - Official Government transportation
- Misuse of position: An employer shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized by other law or regulation.

Gift Analysis

- **Rule:** An employee shall not directly or indirectly solicit or accept a gift.
- Is it from a prohibited source?
- Is it offered because of your official position?
- Is it a “gift”?
  - Exclusions: Modest items of food; of little intrinsic value (cards, plaques)
- Is there an exception?
  - Gifts up to $20, up to $50/year; based on personal relationships/outside employment*
- Is there a limitation on the exception?
- Is there an appearance problem? Frequency?

Gifts—Special

- Foreign gifts:
  - May accept gift of “minimal value” (retail value in US at time of acceptance of $375* or less)
  - Must aggregate gifts (including gifts to spouse)
  - Diplomatically refuse, accept as gift to US, pay FMV
- Gifts to supervisors:
  - Generally no
  - Exception: Infrequent, special occasions (wedding, illness, birth of child, or occasion that terminates the superior/subordinate relationship)
    - Never cash—“appropriate to the occasion”
    - MUST be voluntary
    - $10 per person (free to voluntarily give more)
    - Aggregate gifts up to $300
  - Exception: Hospitality and host/hostess gifts, occasional basis items <$10
- Gifts from supervisors:

Solicitation

- **Rule:** A DoD employee shall not knowingly solicit or make solicited sales to DoD personnel who are junior in rank, grade or position, or to family members of such personnel, on or off duty
- From junior to senior: no rule but discouraged
- Base Orders on door-to-door solicitation
- **NO!!!**: Girl Scout Cookies, Mary Kay, School fundraisers, etc.
  - CFC and Navy-Marine Corps Relief are authorized
  - By/For/Among: OK (doesn't include contractors)
  - Informal funds/soda messes

Fundraisers

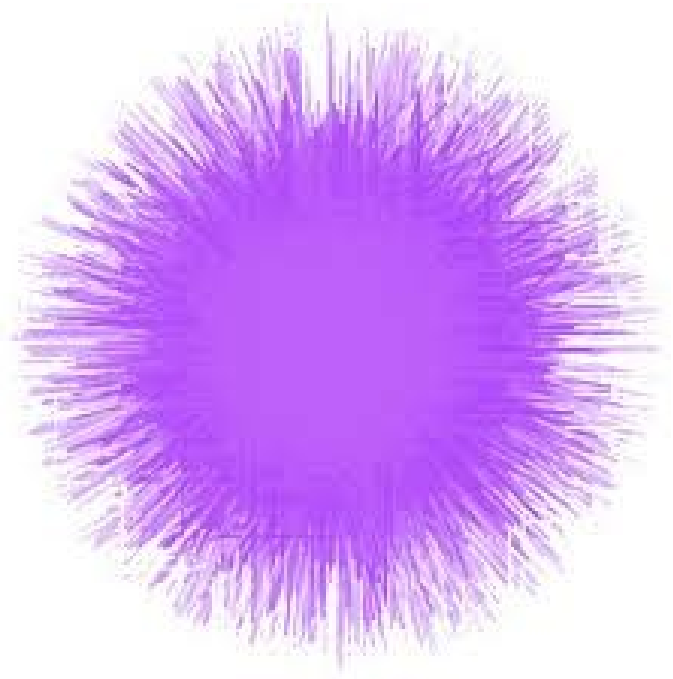
- No active and visible participation in event: do not sit at head table, be the honorary chairperson, stand in receiving line, etc.
- Appearance: avoid the VIP dinner before the event because pictures taken can look like selling access to the GO/gov't official
- SECDEF (Gates) Model: spoke at a dinner only and then left without eating
- Personal Capacity Disclaimers: at the beginning and end of the speech (or the blog entry, article, etc.) so it is clear that you are acting in your personal capacity
- DoD title: should not be given in a biography unless listed with at least three other facts so it is not the primary fact highlighted

Other Ethics Topics

- **Post-Government Employment:**
  - Lifetime prohibition in matters in which participated personally and substantially
  - Two-year restriction in matters pending under official responsibility
  - One-year “cooling off” period for senior employees
  - Procurement Integrity Act: special reporting rules for procurement officials
  - 2014 DoD Public Affairs Guidance for Political Campaigns and Elections

- **Hatch Act:** Restricts partisan political activities of civilian DoD employees
  - DoD policy further restricts the partisan political activities of certain political appointees and SES
  - Military Personnel: Similar rules, which are described in DoD Directive 1344.10, Political Activities by Members of the Armed Forces—should not engage in partisan politics
  - *Partisan* is any activity associated with the success of a political party,

Questions



danielle.bianchi@usmc.mil

703-604-4662